AF/3743

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8/13/01

Attorney Docket: COO-1CPA2

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Applicant:	William Elkins
Serial No.:	Second CPA of 09/127,256
Filed:	February 9, 2000 (original filed July 31, 1998)
For:	**Compliant Heat Exchange Panel**
Art Unit:	3743
Examiner:	Leonard R. Leo

COMMISSIONER FOR PATENTS
Washington, DC 20231

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REPLY BRIEF

This is in response to the Examiner's Answer mailed January 3, 2001.

The first thing that struck applicant upon reading the Examiner's Answer was the apparent misstatement as to what applicant is claiming. (This misstatement relates to the preamble of the structure claims in Group I.) The applicant is reminded in the Examiner's Answer that the claimed instant invention is a "'heat exchange panel,' regardless of statements of intended use or disclosure." (Examiner's Answer, p. 5, typewritten lines 10 and 11.) Applicant believes that rather than this being a shallow attempt by the examiner to mislead the board, it is the result of either the examiner not knowing his parts of speech (or hoping the board members will not know theirs) or just a black-and-white unwillingness to consider any wording after the identifying noun in a claim preamble. The preamble actually reads "A heat exchange panel to be

conformed to a complex shape" (emphasis added). The underlined phrase is an adjectival phrase which is as limiting with respect to the noun "panel," just as an adjective before the word would be. It simply cannot be ignored if a correct construction is to be placed on the wording applicant has used to define his invention. When it is not ignored, it is clear, that applicant believes, that the Haugeneder reference is nonanalogous art. The floor heater of Haugeneder is no more a "heat exchange panel to be conformed to a complex shape" as is an automobile radiator. (An automobile radiator is another type of heat exchange panel.) This language simply cannot be ignored.

A more careful analysis of the Examiner's answer brings out many other points. For one, it is noted that the Examiner brings out that the law is that the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. (Examiner's Answer, page 5, lines 14 et seq.) Applicant agrees that this is a law, but so what. Applicant does not take a position inconsistent with such law. It simply is quite unclear as to why the point is made in the Examiner's Answer; it is inapplicable and certainly makes it appear that the examiner in this situation is simply using stock phrases.

It is also stated in the Examiner's Answer (page 4, line 1 et seq.) that Haugeneder discloses "a plurality of dot matrix of attachments 3-6 arranged into first and second imaginary lines crossing at 90 degrees for the purpose of achieving a desired heat exchange by providing optimum flow resistance and flow" (column 3, lines 43-50). This simply is not true. Rather, Haugeneder discloses a pattern of supporting posts (emphasis added) between the plates of the disclosed floor heater. (Admittedly, in most instances these posts are referred to by Haugeneder as "spacing elements.")

Insofar as the curvilinear ripple construction of the border seal of the second group of claims is concerned, the Examiner's Answer states, in effect, that this ripple construction is inherently taught by the Haugeneder reference "due to the orientation of imaginary lines at 90 degrees, since a cycle of lengths would be shortened." (Examiner's Answer, page 6, typewritten lines 12 and 13.) What? The orientation of the imaginary lines defining the post pattern has nothing whatsoever to do with the construction of the border seal. Perhaps the examiner is reaching for straws.

The Examiner's Answer continues to refer to the "legal conclusion" in the Kast Declaration of the unobviousness of the combination of applicant's prior art Fig. 2 and Haugeneder. Applicant explained earlier and in his brief that the filing of the Kast Declaration was not intended to take away from the examiner the power to make his legal conclusion of the obviousness/unobviousness of the invention. This continuing reference to this point by the examiner makes one wonder as to his objectivity relative to the expert opinion evidence provided by the Kast Declaration.

The Examiner's Answer also brings out "Appellant chooses to ignore the combination of references and the clear motivation provided therein." (Examiner's Answer, page 7, typewritten lines 10 and 11.) Appellant is not ignoring the combination of references. It is just that it is inappropriate to include a nonanalogous reference as part of an anticipatory combination.

The rhetorical question in the Examiner's Answer "Should the Office grant patents for two identical structured devices, even though the inventors were facing different problems?" (Examiner's Answer, page 7, typewritten lines 13-15) is not understood. What possibility is there in this situation that the USPTO will grant patents for two identically structured devices. There is none.

It would be a true injustice if applicant is denied patent protection on this invention in view of an improper combination of references. Perhaps the whole reason applicant even found it necessary to appeal the rejection is the examiner's apparent misunderstanding (or rote application of a rule) regarding the limiting effect of adjective phrases in preambles of structure claims. Perhaps this case will enable the Board to make it clear to this examiner that he must take into consideration the limiting effect of some of the language which follows the identifying nouns in claim preambles.

Respectfully submitted,

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